

DRUGGED DRIVING CONFERENCE

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Law Enforcement Administrative Facility (LEAF)



MARIJUANA AND PRESCRIPTION CASES

Presented by:

Beth Barnes, GOHS TSRP, Assistant Phoenix City Prosecutor

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ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL
1951 West Camelback Road, Suite 202
Phoenix, Arizona 85015

ELIZABETH ORTIZ
EXECUTIVE DIRECTOR

DUI PRESCRIPTION DRUGS QUICK REFERENCES

- Ensure the defendant timely disclosed the affirmative defense including all supporting witnesses and evidence pursuant to 16A A.R.S. *Rules Crim. Proc.*, Rule 15.2(b). Object to untimely disclosure.
- Verify the defendant provided a prescription that was valid on the date of violation for every drug found in his/her system. A pharmacy printout is likely not enough. The defendant needs to provide the dosages, warnings, etc.
- Review police report and interview witnesses for any evidence that defendant was not taking the drugs “as prescribed.”
- RESEARCH the drug!!! Review Physician’s Desk Reference, Drug Bible, MD.com, etc. Consult with crime lab and conduct other research to learn about the specific drug in question. Concentrate on the drug’s effects, the warnings and drug interactions. Use this information with our experts and to cross-examine defense experts. Use any warnings about driving, operating heavy machinery, etc. to argue the defendant is not taking the drug as prescribed.
- Move in *limine* to preclude any suggestion that a prescription is a defense to the (A)(1) charge or impairment is required for the (A)(3) charge.
- Move in *limine* to preclude hearsay regarding prescriptions by people other than the person who prescribed the drugs. This type of hearsay includes:
 - a. Statements on the prescription bottles
 - b. Pharmacy printouts
 - c. The Prescription itself
 - d. The defendant repeating the doctor’s words or the words in the prescription concerning the dosage and when and how it is to be taken, as well as whether it can be taken along with other drugs or while driving.
- The prescription or the printouts from the pharmacy must meet an exception to the hearsay rule and be authenticated in order to be admitted.

- If the defense has not provided a valid prescription for every drug in his/her system, move in *limine* to preclude the prescription drug defense to the (A)(3) charge and to the admission of any evidence that there was a prescription. (It tells one nothing about impairment so is not relevant to either charge.)
- Request specific prescription drug *voir dire* questions. (Ask Beth)
- During opening statements and closing arguments make it clear to the jury that these are separate charges. Impairment is not required for the (A)(3) charge and they may not consider a prescription when considering the (A)(1) charge.
- Request and argue appropriate jury instructions. Use *Fannin* as authority for the jury instructions. (Ask Beth for examples)

28-1381(A)(3) & (D) AFFIRMATIVE DEFENSE PRACTICE TIPS

The only element the State must prove is the presence of the regulated drug in the system

The A.R.S. § 28-1381(A)(3) charge is a *per se* strict liability offense. The State only has the burden to prove, (in addition to driving/ APC, jurisdiction and identity) the element that the defendant had drugs listed in A.R.S. § 13-3401 or their metabolites in their system. That is it (unless it is a metabolite case – then we also have to prove the metabolite is capable of impairment – not that the defendant was impaired by it or that there was enough in the system to cause impairment.).

The burden is on the defense to disprove abuse and to prove a valid prescription

Frequently in prescription drug cases a prosecutor will dismiss the (A)(3) charge when the defendant provides a valid prescription. As the *Fannin* ruling demonstrates, having a legitimate prescription that accounts for every drug found in the defendant's system is only the first part of the defense. The defendant must also prove, by a preponderance of the evidence that the drugs or metabolites were taken "as prescribed."

Evidence that the defendant is abusing a prescription and not taking the drug(s) "as prescribed" may be useful in rebutting the defense and arguing that

the defense has not met its burden by a preponderance of the evidence. Abuse of a prescription may take many forms, not all of which can be listed here. Using the drugs after the prescription has expired, taking a higher dose, or at different intervals than prescribed, using the drug in combination with alcohol or other drugs or while driving may indicate that the defendant was not taking the drugs “as prescribed.” It is not our burden under the A.R.S. § 28-1381(A)(3) charge to prove abuse. It is the defendant’s burden to show proper use.

The State does not have to prove when the drugs were used or their dosage and we don’t have to show that the drugs or metabolites impaired the defendant or weren’t within “therapeutic ranges” for the (A)(3) charge.

Evidence of proper use and a prescription is irrelevant to impairment under the (A)(1) charge

Be mindful that according to A.R.S. § 28-1381(B), it is not a defense to an (A)(1) charge that the person is or has been entitled to use the drug under the laws of this state. So even though the prescription may be admissible (if proper foundation is laid) for the defense to the (A)(3) charge, it is irrelevant to the (A)(1) charge. Consider asking for a limiting instruction under Rule 105 reminding the jury that they may not consider information about a prescription in deciding the impairment charge.

The affirmative defense must be disclosed prior to trial

Remember pursuant to 16A A.R.S. *Rules Crim. Proc.*, Rule 15.2(b) an affirmative defense must be alleged and the witnesses that will support the defense disclosed 20 days after the prosecutor’s disclosure under 15.2. Object to any untimely disclosure.

Directed verdicts are almost always inappropriate

Whether the defendant has proven the affirmative defense to the jury or fact finder by a preponderance of the evidence is a question of fact for the jury or fact finder. See, *State v. Gessler*, 142 Ariz. 379, 690 P.2d 98 (1984).

Voir Dire and jury instruction are very important in these cases

Prepare both before trial. (See materials for those sessions.)

These chart demonstrate how quickly THC can move from the blood to the other fatty portions of the body.

Mean THC, 11-OH-THC & THCCOOH During Marijuana Smoking (3.55% THC)



